Office Supreme Court
MAY 23

No. 213

IN THE

Supreme Court of the United States

October Term 1957

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, ET AL.,
Respondents

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957, DENYING CERTIORARI; AND PETITION FOR REHEARING

THE WEBSTER MOTOR CAR COMPANY
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MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957, DENYING CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Webster Motor Car Company respectfully applies to the Court for leave to file a petition for rehearing of this Court's order of October 14, 1957, denying certiorari.[1]

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[1] The District Court decision is reported at 135 F. Supp. 4. The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 243 F. 2d 418.
Certiorari was denied October 14, 1957, 355 U.S. 822; rehearing was denied December 9, 1957, 355 U.S. 900.

I The soundness of the decision of petitioner's case will be ruled on by this Court in three cases now pending therein.

Petitioner feels justified in making this second request for rehearing because three cases are pending before this Court [2] in which the soundness of the decision of petitioner's case by the United States Court of Appeals for the District of Columbia Circuit is directly in issue, and petitioner believes, for the reasons stated in the accompanying petition, that this Court will reverse the Circuit Court's decision in favor of respondent. The relevant market reasoning and decision of the Circuit Court is not warranted by, and is an unauthorized extension of, this Court's decision in the cellophane case, *United States v. du Pont & Co.*, 351 U.S. 377.

To assist this Court in its consideration of the *Webster* case, petitioner has filed today a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* in the perfume cases.

II Proceedings in the courts below relating to taxation of costs furnish an additional reason for granting the petition.

Following denial of certiorari in this case, and denial of rehearing, Packard has recently taken steps in the United States Court of Appeals for the District of Columbia Circuit preparatory to trying to impose on Webster a crushing burden of costs—over $40,000.

Packard's attempt to crush the last breath of financial life out of petitioner by exacting enormous costs is almost certain to become the subject of a full-fledged law suit, with eventual appeal to this Court. Packard's next taxa-

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[2] *Guerlain, Inc.* v. *United States*, No. 692; *Parfums Corday, Inc.* v. *United States*, No. 751; *Lanvin Parfums, Inc.* v. *United States*, No. 752.

tion-of-costs move undoubtedly will be in the District Court for the District of Columbia where the case is still actively pending.

The gross injustice of such an attack upon petitioner by the party whom a jury and two respected judges below (Judge Holtzoff and Judge Bazelon) found to have conspired to accomplish, and to have accomplished, the unlawful destruction of petitioner's business worth $190,000, needs no elaboration.[3] It makes a mockery of this Court's frequent pronouncements that private-party antitrust suits must be encouraged as important enforcement aids. Indeed, doubly so here, where petitioner, without asking or receiving any Government assistance, successfully carried the heavy antitrust burden of proof and expense further than any private party has done before in the District of Columbia Circuit, or any automobile dealer has ever done before in any Circuit. To make matters worse, the man whom Packard seeks thus finally to destroy—Richard Webster, owner of the Webster Company—led the world in Packard sales for 11 consecutive years (1926-1936). What is more, Packard has never contended that the Webster business was conducted in a way which failed to reflect credit on Packard. Packard's Washington manager, Braden, who best knew the Webster operation, testified to its excellence.

Petitioner respectfully suggests that by granting this motion and its accompanying petition resolution of the issue as to costs will be held in abeyance until this Court has ruled on petitioner's case in its decision of the three perfume cases now before the Court.

Conclusion

Petitioner prays that because of the impending decision of the perfume cases, involving, as its almost cer-

[3] Judge Holtzoff's opinion is reported at 135 F. Supp. 4; Judge Bazelon's dissenting opinion at 243 F. 2d 421.

tainly will, a review of the still very much alive *Webster* case, this Court will either:

a. Grant this motion for leave to file the accompanying petition for rehearing of the order of this Court denying certiorari; or

b. Withhold decision on this motion and petition until, in the course of deciding the perfume cases, it rules on the correctness of the *Webster* case so heavily relied on by the perfume company appellants.

Respectfully submitted,

THE WEBSTER MOTOR CAR COMPANY
By Its Attorney
DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

Certificate of Service

I, Donald Dent Webster, hereby certify that service of the foregoing motion and accompanying petition was made on May 26, 1958 by mailing copies thereof, with first class postage prepaid, to Robert W. Barker, Counsel of Record for Packard Motor Car Co. at his Post Office address 744 Jackson Place, Washington 6, D. C.

DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

May 26, 1958

PETITION FOR REHEARING OF THIS COURT'S ORDER OF OCTOBER 14, 1957 DENYING CERTIORARI

I The soundness of the decision of petitioner's case is before this Court in three cases pending therein.

Since the denial of petitioner's petition for certiorari on October 14, 1957, and denial of its petition for rehearing on December 9, 1957, this Court has noted jurisdiction of three cases which directly present for decision by this Court the correctness of the decision of this case by the Court of Appeals for the District of Columbia Circuit, 243 F. 2d 418. Those cases—referred to herein as "the perfume cases"—are *Guerlain, Inc.* v. *United States*, No. 692, *Parfums Corday, Inc.* v. *United States*, No. 751, and *Laurin Parfums Inc.*, v. *United States*, No. 752.

Each of the perfume companies was found by District Judge Edelstein (155 F. Supp. 77) to have violated section 2 of the Sherman Act by attempting to monopolize and by actually monopolizing its own brand of trademarked toilet goods. Each company is asking this Court to reverse the judgment against it on the ground that it is in conflict with the relevant market doctrine and decision in the *Webster* case, and that Judge Edelstein erred in distinguishing, rather than following, the *Webster* decision.

II There is a conflict between the Webster case and the perfume cases.

Webster's complaint charged that Zell Motor Car Co., a large dealer in Baltimore who disliked competing with Webster and another Packard dealer there as to trade-in allowances and the cost of parts and service, told Packard that it would go out of business and not buy any more cars unless Packard agreed not to sell any more cars

to Webster and the other competing dealer. Packard secretly agreed (although it had no complaint against the other dealers, and no prior thought of not continuing their franchises) and terminated their dealerships. This, Webster claimed, violated the Sherman Act in that:

(a) Interstate commerce in Packard cars was unreasonably restrained by an agreement and conspiracy in violation of Section 1; and

(b) The attempt of Zell and Packard to give Zell a monopoly of the sale of Packard cars in Baltimore was effected through an agreement and conspiracy in violation of section 2.

The District Court left to the jury all the vital questions of fact. It left to the jury the question of which of the two types of competition was more important to the Baltimore public,—competition between Packard dealers there, or competition there between Packard and other makes of cars. The jury was instructed that if it found the latter the more important it should bring in a verdict for Packard. The jury was also instructed that unless it found the restraint imposed by the Zell-Packard agreement to be unreasonable and injurious to the Baltimore public Packard could not be held liable.

The jury found for Webster; and Packard's motions for a new trial and for judgment n.o.v. were denied, 135 F. Supp. 4.[1]

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[1] Cf. *Northern Pacific Railway Co. et al.* v. *United States*, March 10, 1958, Vol. 26 L. Wk. No. 35, March 11, 1958. The situation there of a refusal to sell unless the buyer agreed to the seller's demand that competition in freight traffic be eliminated is in essence no different from the *Webster* case where Zell refused to buy from Packard unless Packard eliminated competition in the sale of Packard cars in Baltimore. An agreement in unreasonable restraint of interstate commerce, induced by economic pressure, is clearly violative of the Sherman Act.

A divided Court of Appeals reversed, 243 F. 2d 418. Chief Judge Edgerton and Judge Prettyman held that under the doctrine of the cellophane case, *United States v. du Pont & Co.*, 351 U.S. 377, 393, the relevant market *as a matter of law* embraced all makes of automobiles, not just Packards. They then carried their relevant market reasoning over into Section 1, and held,—despite the jury's verdict that the restraint imposed was in fact unreasonable,—that it was reasonable as a matter of law because there were other makes of cars still available.

Judge Bazelon dissented on the ground that the charge of violation of Section 2, with its related relevant market issues, need never have been reached in deciding the appeal, since there was ample evidence to support the jury's finding that the restraint imposed was unreasonable and in violation of Section 1.

Thus the *Webster* case clearly involved:

(a) Alleged violations of Section 1 and 2;

(b) A conspiracy between a supplier and a preferred dealer whereby the supplier, under economic pressure from the dealer, stopped selling to all of the other competing dealers in that area,—in short, a conspiracy to eliminate competitors, and an accomplished attempt to create a monopoly.

(c) A jury verdict for Webster which, in view of the Court's instructions, could not have been rendered except for the fact that the jury found the relevant market to be the Baltimore Packard market; and the agreement an unreasonable restraint,—and

(d) A unique, high-priced make of automobile which is never sold "off-the-shelf" by a dealer selling other competing brands; whose trade-in value is greatest when offered to Packard dealers; and the repair of which often can be accomplished only by Packard tools and factory-trained mechanics.

None of these factors justifying a narrow construction of the relevant market were present in the perfume cases.

Each of the perfume cases involves an alleged violation of Section 2 only. The defendants were charged with attempting to monopolize and monopolizing their own trade-marked toilet goods.

They were not charged with having agreed or conspired with anyone.

Nor were they charged with having imposed an unreasonable restraint on interstate commerce.

They were not accused of eliminating existing competition.

No jury verdict, as in the *Webster* case, supports the District Judge's finding of fact that the relevant market in each of the perfume cases was restricted to each defendant's own trade-marked toilet goods.

Unlike the unique high-priced Packard automobiles involved in the *Webster* case, each of the perfume cases concerns one brand of trade-marked toilet goods, sold "off-the-shelf" by dealers selling competing brand toilet goods off the same shelf.

Unlike the usual trade-in involved in the sale of a new Packard, no trade-ins interfered with the cross-elasticity of demand for the various brands of perfumes.

Nor were there any specialized repair or service considerations involved in the sale of toilet goods by the perfume case defendants.

There are at least two respects in which there is an irreconcilable conflict between the decisions in *Webster* and the perfume cases, which should be resolved by this Court.

(a) If, as a matter of law, as held by the Court of Appeals in *Webster*, an agreement between a dealer and

a manufacturer as to a single brand of automobile cannot constitute an unreasonable restraint of interstate commerce in violation of section 1 of the Sherman Act, it certainly must follow that there cannot be an unlawful attempt of a manufacturer to monopolize only his own brand of toilet goods in violation of section 2.

The *Webster* decision, as it stands, clearly supports the perfume company appellants' contention that if as a matter of law there cannot be an attempt to monopolize a particular make of automobile there cannot be an attempt to monopolize a brand of trade-marked toilet goods.

(b) Judge Edelstein cited with approval Professor Turner's article "Antitrust Policy and The Cellophane Case," 70 Harvard Law Review 281 (1956). At p. 305 Professor Turner says:

> "If defendants are attempting to drive someone out of the market by foul means rather than fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal . . . 'and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n 59 (1950).'"

And at p. 307:

> "It is reasonable to discard any refined concept of market in attempt and conspiracy cases, because the conduct involved is so egregious that it may be appropriately condemned per se."

It was largely in reliance on this doctrine that Judge Edelstein decided the perfume cases against the defendants. See his discussion at pp. 85-86 of his opinion, where he summed up his thinking in the statement:

> "Where, however, exclusionary conduct demonstrates a specific intent to prevent competition, the analogy of the attempt and conspiracy cases is forceful. The fact that an attempt is successful is hardly reason to destroy the analogy, and a limited definition of the market is therefor appropriate."

It seems clear that if Judge Edelstein had understood the *Webster* case, he would have realized that it is in conflict with what is quoted above, and would have been forced to a flat disagreement with, and would have rejected, appellant's reliance on *Webster*.

It is only fair to suggest that the 4th Circuit's *per curiam* affirmance of the Schwing case (*Schwing Motor Car Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899; 239 F. 2d 176, cert. den. 355 U.S. 823) and this Court's denial of certiorari in *Webster* may have diverted Judge Edelstein's attention from a careful reading of those cases.

However that may be, applicant firmly believes that the *Webster* decision is erroneous because (a) it conflicts with the sound reasoning of Professor Turner as to attempt and conspiracy cases; (b) it improperly treats as applicable to Section 1 cases, and to cases involving attempts to monopolize, the statement of Mr. Justice Reed at page 393 of the decision in the cellophane case, *supra*, that "the power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly"; (c) it overrides a jury decision as to relevant market and public injury rendered under instructions which were not challenged by the Circuit Court majority.

III Conflict With Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721.

The majority opinion in the Court of Appeals decision of petitioner's case makes clear that great reliance was placed on the views of Professor Milton Handler set forth

in The New York Bar Association Record, Vol. 11, No. 7, p. 367. See 243 F. 2d at pp. 420, 421. The article urges that both the Tenth Circuit in *Village Theatre* and Judge Holtzoff in petitioner's case were in error in holding that the reasonableness or unreasonableness of a verticle agreement to eliminate competitors is a jury question. Professor Handler had appeared for defendants in the *Village Theatre* case, and presumably made the same argument there. In a later article, The Record, Vol. 12, No. 7, p. 411, following the Court of Appeals decision of petitioner's case and the 4th Circuit decision in the *Schwing* case, *supra*, Professor Handler restates the conflict between *Village Theatre* and the decisions in petitioner's case and in *Schwing*, and argues that the *Village Theatre* decision is not sound law.

Petitioner has only recently learned through counsel for the Village Theatre that, following remand of the case by the Tenth Circuit for a jury trial of the issue of reasonableness of the restrictive agreement, the case has been settled. In consequence, there is no possibility that that case can be brought to this Court through normal procedure for resolution of the conflict. It can be resolved only by a ruling such as is available and is now requested by this petition.

IV Other circumstances bearing on the propriety of allowance of this petition and review of this case by this Court.

(a) The granting of this petition may avert the imposition on petitioner of a crushing and improper burden of costs.

Following denial of certiorari in this case, and denial of rehearing, Packard has recently taken steps in the United States Court of Appeals for the District of Columbia Circuit preparatory to trying to impose on Webster a crushing burden of costs—over $40,000.

Packard's attempt to crush the last breath of financial life out of petitioner by exacting enormous costs on Webster is almost certain to become the subject of a full-fledged law suit, with eventual appeal to this Court. Packard's next taxation-of-costs move undoubtedly will be in the District Court for the District of Columbia where the case is still actively pending.

The gross injustice of such an attack upon petitioner by the party whom a jury and two respected judges below (Judge Holtzoff and Judge Bazelon)[4] found to have conspired to accomplish, and to have accomplished, the unlawful destruction of petitioner's business worth $190,000, needs no elaboration. It makes a mockery of this Court's frequent pronouncements that private-party antitrust suits must be encouraged as important enforcement aids. Indeed, doubly so here, where petitioner, without asking or receiving any Government assistance, successfully carried the heavy antitrust burden of proof and expense further than any private party has done before in the District of Columbia Circuit, or any automobile dealer has ever done before in any Circuit. To make matters worse, the man whom Packard seeks thus finally to destroy—Richard Webster, owner of the Webster Company—led the world in Packard sales for 11 consecutive years (1926-1936). What is more, Packard has never contended that the Webster business was conducted in a way which failed to reflect credit on Packard. Packard's Washington manager, Braden, who best knew the Webster operation, testified to its excellence.

Petitioner respectfully suggests that by granting this petition resolution of the issue as to costs will be held in abeyance until this Court has ruled on petitioner's case in its decision of the three perfume cases now before the Court.

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[4] Judge Holtzoff's opinion is reported at 135 F. Supp. 4; Judge Bazelon's dissenting opinion at 243 F. 2d 421.

(b) There is great confusion in antitrust law circles as to the extent to which the relevant market considerations discussed in the cellophane case are relevant and decisive in cases involving conspiracies or agreements to eliminate competition, and attempts to monopolize, and not involving actual monopoly. Professor Turner's article, *supra*, is one of many current articles on the subject. Another example—which approaches the matter with particular attention to exclusive dealerships—is by Chapman, in Kansas Law Review, Vol. 6, p. 384, March 1958.

Conclusion

Petitioner respectfully urges that the decision of the Court of Appeals in this case is wrong and destructive of sound development of antitrust doctrine for the reasons stated above and in the petition for certiorari and for rehearing; and that the immence of a pronouncement upon this case in the course of decision of the perfume cases warrants allowance of this petition.

Wherefore petitioner prays that this petition be allowed.

THE WEBSTER MOTOR CAR CO.
By Its Attorney

DONALD DENT WEBSTER
Tingley Road, M.R. 17
Morristown, New Jersey

Certificate

I, Donald Dent Webster, certify that this petition is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58-2 of the Rules of this Court.

DONALD DENT WEBSTER